No.

IN THE
SUPREME COURT OF THE UNITED STATES

LYNDA MARQUARDT,

Petitioner,

v.

MICHAEL O. LEAVITT, SECRETARY,
UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal agency may raise a timeliness defense in an employment discrimination complaint filed in federal court, where it knowingly accepted the underlying untimely administrative complaint, investigated it, and issued a final decision on the merits without ever raising the issue of timeliness.

PARTIES TO THE PROCEEDING

All parties are named in the caption to the case.

NOTE: Michael O. Leavitt is no longer Secretary of the Department of Health and Human Services. As of this writing, a new Secretary has not yet been confirmed.

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DECISIONS BELOW

The opinion of the court of appeals (Pet. App., A-1) is reported at *Marquardt v. Leavitt*, 2008 U.S. App. LEXIS 20420 (5th Cir. Tex., Sept. 25, 2008). The Court's order denying rehearing and rehearing en banc (Pet. App., A-3) is unpublished. The opinion of the district court (Pet. App., A-5) is reported at *Marquardt v. Leavitt*, 2008 U .S. Dist. LEXIS 8624 (N.D. Tex. Feb. 6, 2008). The opinion of the Director, Office of Diversity Management and Equal Employment Opportunity in the Office of the Secretary, United States Department of Health and Human Services is unreported. *Lynda Marquardt, HRS-005-05.*(Pet. App., A-21)(excerpt)

JURISDICTION

The court of appeals entered judgment on September 25, 2008. (Pet. App., A-1). An order denying rehearing and rehearing en banc was entered on November 18, 2008. (Pet. App., A-3.) This Court has jurisdiction under 28 U.S.C. § 1254. This Petition is filed within 90 days of the order denying rehearing and rehearing en banc.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. **42 U.S.C. 2000e-16 (a)**

§2000e-16. Employment by Federal Government

(a)Discriminatory practices prohibited; employees or applicants for employment subject to

coverage. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code) in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

2. **29 U.S.C. § 633a**

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected. All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as

defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on age.

3. **29 C.F.R. 1614.107(a)(2)**

§ 1614.107 Dismissal of Complaints

(a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:... .

(2) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor.

4. **29 C.F.R. 1614.604 (c)**

1614.604 (c) Filing and computation of time

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

STATEMENT OF THE CASE

The decision below represents a preexisting split among the federal circuits on an important and recurring question affecting the substantive and statutory rights of federal employees who complain about discrimination.

The question to be resolved is whether a federal agency waives a timeliness defense in federal court when it knowingly accepts a discrimination complaint after the 45-day filing deadline, investigates it, and issues a final decision on the merits without ever raising the issue of timeliness.

In the decision below, the Fifth Circuit relied on its rule announced in *Rowe v. Sullivan*, 967.F.2d 186, 191 (5th Cir. 1992), which holds that a federal agency does not waive a timeliness defense in federal court unless it has made a specific finding of timelines.

Statement Of Material Facts

On May 18, 2006, Lynda Marquardt, a long-term employee of the U.S. Department of Health and Human Services, Health Resources Service Administration ("HRSA" or "the agency"), sued the agency for its failure to promote her because of unlawful gender and age discrimination in federal employment pursuant to Title VII, 42 U.S.C. §§ 2000e-16(a)(2007), and the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 633a (2008).

Prior to filing suit and after Marquardt was twice passed over for a promotion, she filed a discrimination complaint with the agency based on age and gender. However, because the Dallas Regional Office where she worked had no Equal Employment Opportunity ("EEO") contact person on site or any conspicuous information posted outlining the EEO process, she filed her initial informal complaint after the deadline for doing so had elapsed. At the time of filing, she informed the EEO counselor in writing that she would have filed an EEO action sooner if she had been aware of the deadline for doing so. (Pet. App., A-23) The stated policy of the agency's EEO office was to enforce the 45-day deadline only "loosely." (Pet. App., A-24) Marquardt met all other deadlines in a timely fashion.

The agency accepted her complaint, did a lengthy investigation, and issued a Final Agency Decision on the merits without ever raising the issue of timeliness. That decision stated explicitly that "the entire record has been reviewed and considered." (Pet. App., A-21.)

On May 18, 2006, Marquardt timely exercised her right to file a discrimination complaint in federal court.

On September 27, 2007, after a lengthy discovery period, which included numerous depositions and several contentious pretrial motions, the agency filed a motion for summary judgment arguing, *inter alia*, that Marquardt's case

should be dismissed because her initial informal complaint was untimely.

The district court granted the motion, relying on Fifth Circuit precedent holding that a federal agency does not waive a timeliness defense unless it makes a specific finding of timeliness. *Rowe*, at 967 F.2d 186, 191. The trial court's order was final and disposed of all the issues.

Marquardt timely filed a notice of appeal pursuant to 28 U.S.C. § 1291 with the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The question presented is one of exceptional significance because the Fifth Circuit rule is in direct conflict with a number of authoritative decisions of other courts of appeal and involves important issues of public policy, statutory interpretation, and fundamental fairness.

1. The Decision Below Directly Conflicts With The Rulings Of Other Courts Of Appeal And District Courts.

Fifth Circuit jurisprudence on the question of administrative waiver of a timeliness defense is at odds with the majority of courts that have addressed the issue. A leading and widely followed case from the Seventh Circuit involved facts nearly identical to Petitioner's: *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001). In *Ester*, the plaintiff claimed that the Department of Veterans Affairs had denied him a promotion in violation of Title VII. The district court dismissed the case on summary judgment because the plaintiff had failed to file a

formal complaint of discrimination within the required 15 days. *Ester*, 250 F.3d at 1068. As in Marquardt's situation, the agency had accepted the complaint, investigated it, and issued a final decision on the merits, without ever raising the issue of timeliness. *Id.*, at 1070-71. In *Ester,* as in the *Marquardt* case, the agency first raised its timeliness defense in its answer to the plaintiff's subsequent lawsuit. *Marquardt v. Leavitt*, 2008 U.S. Dist. LEXIS 8624 (N.D. Tex., Feb. 6, 2008).

The Seventh Circuit reversed the decision of the district court. *Id.*, at 1071-72. In deciding *Ester*, the panel observed that it had not yet addressed the question of when an agency's failure to assert an available exhaustion defense in administrative proceedings should constitute a waiver of such a defense in a subsequent lawsuit. *Id.*, at 1071. The panel also noted that courts of appeal, which had looked at the issue, had not produced uniform results. *Id.* To inform itself on how other courts had approached the question, the panel looked at decisions from three other circuits. First, the panel considered the Fifth Circuit's rule in *Rowe v. Sullivan*, requiring an explicit finding of timeliness before an agency is deemed to have waived a timeliness defense. *Id.*, at 1071 (citing *Rowe*, 967 F.2d at 191). Second, the panel looked at a Ninth Circuit decision, which held that an agency waives a timeliness defense if it makes a finding of discrimination. *Id.*, at 1071-72 (citing *Boyd v. United States Postal Service*, 752 F.2d 410, 414 (9th Cir. 1985)). Finally, in declining to follow either the Fifth or Ninth Circuits, the Seventh Circuit cited

and followed a 1997 decision from the District of Columbia Circuit, which held that when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit. *Id.*, at 1071-72 (citing *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C. Cir. 1997)).

The *Ester* court explained the sound policy reasons for its decision: (1) consistency in the established principles of administrative law; (2) judicial economy; (3) agency autonomy and efficiency; and (4) fairness to plaintiffs. *Ester*, 250 F.3d at 1072.

2. The Decision Below Is Inconsistent With Established Principles Of Administrative Law And Judicial Economy

It is well established that "orderly procedures and good administration" require that procedural objections be raised during the administrative process, where there is opportunity for correction, before those issues are reviewable by the courts. *Ester*, 250 F.3d at 1072 (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 97 L.Ed. 54, 73 S.Ct. 67 (1952)). Consistency in the established principles of administrative law is thus preserved by requiring timeliness objections to be raised during the administrative process. *Ester*, 250 F.3d at 1072.

The principle of judicial economy also is served by requiring known procedural objections to be raised during the administrative process. *Id.* If a potential plaintiff is informed of an agency's

timeliness objections to her discrimination complaint, she is likely to consider more carefully whether or not to seek expensive, time-consuming judicial review or to resolve the dispute at the administrative stage. Also, clarity at the administrative stage allows courts to focus more frequently on the merits of discrimination claims, and limit review to substantive and policy considerations.

3. The Decision Below Promotes Inefficiency And Irresponsibility In Federal Agency Operations, And Frustrates The Purposes Of Federal Anti-Discrimination Laws.

As the *Ester* court observed, inefficiency and irresponsibility in federal agency operations should not be encouraged by allowing agencies to overlook and fail to develop procedural objections that can be corrected during the administrative phase. *Id.* Moreover, if an agency can preserve a timeliness defense simply by refraining to make a specific finding of timeliness, even though it is well aware that such a defense is available, it opens the door to practices that operate to penalize those who complain about discrimination. The purposes of federal anti-discrimination laws are frustrated when plaintiffs are unfairly prejudiced by having to defend a claim of untimeliness that was never previously raised. *Ester*, 250 F.3d at 1072; *42 U.S.C. § 2000e-16(a)*(2007)(all personnel actions affecting federal government employees shall be free from discrimination).

The *Ester* court explicitly declined to extend an "immortal status" to the timeliness defense and held that the defense is waived if the agency reaches the merits of a discrimination complaint without addressing its untimely filing. *Ester*, 250 F.3d at 1073.

The majority of federal courts of appeal that have addressed the question herein presented are either in substantial accord with, or have explicitly followed, *Ester*: *Horton v. Potter*, 369 F.3d 906, 911 (6th Cir. 2004)(waiver occurs when the agency decides a complaint on the merits without raising the untimeliness defense); *Bruce v. United States Department of Justice*, 314 F.3d 71, 74-75 (2d Cir. 2002)(the result reached in *Ester*, that an agency waives an untimeliness defense if it issues a decision on the merits without raising the defense is "sound" and "good law"); *Hall v. Dep't of the Treasury*, 264 F.3d 1050, 1061 (Fed. Cir. 2001) (waiver occurs when the agency decides a complaint on the merits without addressing the untimeliness defense.)

In addition, district courts in the First, Eighth, and Eleventh Circuits are either in substantial agreement with the Seventh Circuit's *Ester* decision or have cited it with approval. The District Court for the District of Massachusetts followed *Ester* in deciding that a federal agency waived the defense of untimely exhaustion of administrative remedies when it did not raise the issue before, or at the time, it issued its final decision on the merits. *MacDougall v. Potter*, 431 F. Supp.2d 124, 129 (D.C. Mass., 2006). *See also*, *Slivicki v. Prinicipi*,

2006 U.S. Dist. LEXIS 73437 (D.N.D, 2006)(the defendant agency waived a timeliness defense when it never raised the issue before its summary judgment motion); *Moncus v. Johanns*, 2006 U.S.Dist. LEXIS 4648, *22-24; 87 Empl. Prac. Dec. (CCH) P42, 306 (M.D. Ala. 2006)(when the defendant agency recognized the timeliness issue at the outset of administrative processing but failed to dismiss the untimely complaint, it waived its objection to the plaintiff's untimely contact).

The Fifth Circuit stands alone among the circuits in bestowing a virtually perpetual status on the timeliness defense, just so long as the defendant agency refrains from, or withholds, making a specific finding of timeliness.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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February 10, 2009

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10190
Summary Calendar

LYNDA MARQUARDT,

Plaintiff-Appellant,

v.

MICHAEL O. LEAVITT,
Secretary, Department of Health and Human Services,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas
No. 3:06-CV-893

Before SMITH, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:[1]

---

[1] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Lynda Marquardt appeals a summary judgment entered in her title VII case. She mainly contends the district court should not have dismissed her claims of age and sex discrimination for failure to initiate her administrative remedies within the required period of time. For the most part, however, she appears to acknowledge that her argument for timeliness is foreclosed by *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992), on which the district court properly relied. On her retaliation claim, the district court correctly concluded that Marquardt failed to show a causal link between her protected activity and the adverse employment action.

The district court issued a comprehensive and persuasive Memorandum Opinion and Order. The summary judgment is AFFIRMED, essentially for the reasons given by the district court.

[FILED: SEPTEMBER 25, 2008]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10190

LYNDA MARQUARDT

Plaintiff-Appellant

v.

MICHAEL O. LEAVITT, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

ON PETITION FOR REHEARING EN BANC

(Opinion 9/25/08, 5 Cir., _____, _____F.3d)

Before SMITH, STEWART AND SOUTHWICK, Circuit Judges

PER CURIAM:

[X] Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the

panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

[ ] Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Jerry Smith
United States Circuit Judge

REHG-6a

U.S. COURT OF APPEALS
FILED
Nov 18 2008
Charles R. Fulbruge III
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Case 3:06-cv-00893 Document 86
Filed 02/06/2008

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYNDA MARQUARDT,	§	
	§	
PLAINTIFF,	§	
	§	No. 3:06-CV-0893-AH
V.	§	
	§	
	§	
MICHAEL O. LEAVITT,	§	
SECRETARY, UNITED	§	
STATES DEPARTMENT	§	
OF HEALTH AND	§	
HUMAN SERVICES,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Pursuant to the written consents of the parties and the District Court's order of transfer filed on July 3, 2007, in accordance with the provisions of 28 U.S.C. § 636(c) came on to be considered Defendant's Motion for Summary Judgment

pursuant to Fed. R. Civ. P. 56(c), and the court finds and orders as follows:

SUMMARY JUDGMENT STANDARD

To prevail on a motion for summary judgment, the moving party has the initial burden of showing there is no genuine issue of any material fact and judgment should be entered as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505 (1986).

The materiality of facts is determined by substantive law. Anderson, 477 U.S. at 248. An issue is "material" if it involves a fact that may affect the outcome of the suit under governing law. See *Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633, 635 (5th Cir. 1994). If the moving party presents evidence tending to show the absence of any genuine issue of fact, the opposing party must then identify specific evidence in the record which establishes the existence of one or more issues of fact, i.e. a non-movant may not merely rely on his or her pleadings. See *Anderson*, 477 U.S. at 256-57; see also *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S. Ct. 1348 (1986); Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). In addition, neither conclusory allegations nor hearsay statements are competent evidence sufficient to defeat a motion for summary judgment. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 506 U.S. 825, 113 S. Ct. 82 (1992). In analyzing the competent

evidence proffered by the parties, the facts and the inferences to be drawn are viewed in the light most favorable to the non-movants. *Herrera v. Millsap*, 862 F.2d 1157, 1159 (5th Cir. 1989).

BACKGROUND

Plaintiff Lynda Marquardt ("Marquardt") or "Plaintiff") filed this action against Defendant Michael Leavitt ("Defendant") in his capacity as Secretary of the United State Department of Health and Human Services. Marquardt alleges that she was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, et seq. and the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621, et seq. by reason of Defendant's failure to promote her to positions which were filled by younger, less qualified and less experienced males. She also claims that Defendant retaliated against her for having filed an EEO complaint and the present action by denying her a promotion to a later vacant employment position.

Marquardt is a 61 year old woman who is currently employed as a Social Work Consultant, a GS-13 position, with the Dallas Regional Office of the Department of Health and Human Services ("DHHS") in the Health Resources Services Administration ("HRSA") Office of Performance Review ("OPR"). Plaintiff's Appendix ("Pl. App."), p. 168; Marquardt Declaration ("Marquardt Decl."), Pl. App., p. 1, ¶ 3. She has been employed by HRSA in a GS- 13 position since April 1991. Marquardt Decl., Pl. App., p. 1, ¶ 4.

In August 2003, HRSA announced the creation of new GS-14 Regional Coordinator positions in Vacancy Announcement HRSA 03-060. Marquardt applied for one of three available positions. After the application and interview process, Division Director Shirley Henley ("Henley") informed the candidates for position 03-060 that no selection for the position would be made. Marquardt Decl., Pl. App., p. 8, ¶ 22. On April 20, 2004, Associate Administrator Jim McRae sent an email to all HRSA OPR employees announcing those who had been selected for the Regional Coordinator positions within the various regions with the exception of the Dallas office, in which the Regional Coordinator position was planned to be filled later in the year. Henley Declaration ("Henley Decl."), Def. App., p. 26.

On November 19, 2004, the HRSA re-advertised the GS-14 Regional Coordinator positions in Vacancy Announcement HRSA 05-037. Marquardt again applied for one of the positions. Three panel members interviewed the candidates and those three with the top scores were chosen for the positions. Henley Decl., Def. App., p. 4, ¶ 14. Those chosen included two males and a female, all of whom were over 40 years of age. See EEO Decision dated May 30, 2006, Pl. App., p. 179. On January 25, 2005, Henley informed Marquardt that she had not been selected for position 05-037 and that if she disagreed with the selection, she could pursue EEO or union channels. Henley Decl., Def. App., p. 4, ¶15. Sometime in April 2005, Marquardt filed an EEO complaint. Def. App., p. 242 (excerpt from

Marquardt deposition). It appears that a formal EEO complaint was filed sometime later. The appendices do not include a copy of Plaintiff's complaint concerning her nonselection for the 05-037 position. However, it appears that it was dated May 31, 2005. See Pl. App., p. 173, cover letter dated May 30, 2006 with the notation "DOF: 5-31-05." which was accepted by HRSA on June 25, 2005 and an investigator was assigned to her complaint. Marquardt Decl., Pl. App., pp. 9-10, ¦ 25.1 Marquardt filed the present action on May 18, 2006. On June 5, 2006, she received the final agency decision, dated May 30, 2006, in which the agency found Marquardt's evidence insufficient to prove age or gender discrimination. Pl. App., pp. 173-186. [FN 1]

[FN 1] The appendices do not include a copy of Plaintiff's complaint concerning her non-selection for the 05-037 position. However, it appears that it was dated May 31, 2005. See P. App., p. 193, cover letter dated May 30, 2006 with the notation "DOF: 5-31-05."

On August 23, 2006, HRSA announced vacancy number HRSA 2006-0117, another GS- 14 Regional Coordinator position. Henley Decl., Def. App., p. 4, ¶ 16. Marquardt applied for the position. Marquardt Decl., Pl. App., p. 10, ¶ 29. The candidates were assigned scores based on their interviews and an editing exercise. Henley Decl., Def. App., pp. 4-5, ¶¶ 17-21. On October 26, 2006,

Jeff Jordan, a 36 year-old male and the candidate with the best score, was selected for the position. *Id.* ¶¶ 21-22. Jordan scored 32 (with lower being better) and Marquardt scored 50. Def. App., p. 36. The remaining two candidates -- a female and a male -- received scores of 46 and 38, respectively. *Id.* Marquardt subsequently filed a second EEO complaint, claiming her nonselection for the position was in retaliation for her earlier gender and age discrimination complaint.

PLAINTIFF'S AGE AND GENDER DISCRIMINATION CLAIMS

Defendant contends that summary judgment is appropriate on Plaintiff's age and gender discrimination claims because she failed timely to exhaust her administrative remedies. Federal employees "must initiate contact with a[n] [EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the actions." 29 C.F.R. ¤ 1614.105(a)(1). The 45-day limitation period begins to run from the time the discriminatory event or personnel action occurs, not when the plaintiff discovers or can prove that a discriminatory intent motivated the action. *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir. 1992). The regulations provide for an extension of the 45-day period when the individual shows: (1) that she was not notified of the time limits and was not otherwise aware of them; (2) that she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred; (3) that despite due diligence she was

prevented by circumstances beyond her control from contacting the counselor within the time limits, or (4) for other reasons considered sufficient by the agency or the EEOC. 29 C.F.R. § 1614.105(a)(2). Failure to initiate contact within the required period will bar subsequent review of the claim in federal court absent waiver, estoppel or equitable tolling and it is the employee's burden to establish these exceptions. *See Pacheco*, 966 F.2d at 905.

It is undisputed that Plaintiff received notice via email on April 20, 2004 that the 03-060 position for the Dallas region was not going to be filled and that she was later informed that she was not selected for position 05-037 by Division Director Henley on January 25, 2005. However, she did not initiate contact with an EEO counselor any earlier than April 1, 2005, well past the 45-day deadline.

Marquardt claims that "the Agency knowingly and intentionally extended the 45-day deadline for [her] EEO complaint" and, therefore, the 45-day deadline should be extended under the regulations "for other reasons considered sufficient by the agency. . ." Plaintiff's Response Brief ("Pl. Br."), pp. 18-20. She argues that no one ever mentioned the 45-day filing deadline to her at any stage of the EEO process and submits emails from Henley in which she states that the agency applied the 45-day deadline "loosely." See Pl. App., pp. 118-20. However, in order to waive a timeliness objection, the agency must make a specific finding that the submission was timely. Nor does an agency's docketing and acting on a complaint constitute a waiver of the timeliness requirement set out in ¤

1614.105(a)(1), supra. *See Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992) (citing *Munoz v. Aldridge*, 894 F.2d 1489, 1495 (5th Cir. 1990)); *Oaxaca v. Roscoe*, 641 F.2d 386, 390 (5th Cir. 1981). A review of the final agency decision on Marquardt's EEO complaint reveals no finding with respect to the timeliness of her complaint. Pl. App., pp. 173-186. Therefore, the agency did not waive the 45-day requirement in her case. Marquardt also claims she is entitled to equitable tolling. Equitable tolling applies only in "rare and exceptional circumstances." *Teemac v. Henderson*, 298 F.3d 452, 457 (5th Cir. 2002). The party who invokes equitable tolling bears the burden of proof. Id. "[C]ourts in a long line of cases have held that employees' ignorance of the law . . . cannot justify tolling." *Id.* at 457 (compiling cases). In addition, section 1614.105(a)(2) of the regulations "mandates tolling only where the employee lacks actual and constructive notice of the informal complaint requirement." *Id.* The Fifth Circuit "read[s] this regulation as a narrow exception, situated against the well-established background rule that employees are charged with knowing the law." *Id.* at 458 (denying tolling where plaintiff claimed his inability to speak English prevented him from understanding EEO procedures and holding that "[o]nce the [agency] notified its employees about the informal counseling requirement, [the employee] had the obligation to investigate terms and conditions of employment").

In support of her tolling argument, Marquardt claims, as discussed above, that no agency

employee informed her of the 45-day filing requirement or that she had missed the filing deadline, although she was informed by her attorney that she may have missed a filing deadline. Pl. Br. at 18-20; Marquardt Decl., Pl. App., p. 9, ¶ 25. Marquardt states that there was no EEO contact in the Dallas office and that she "looked but could not find posted information" in her office regarding the EEO process. Marquardt Declaration, Pl. App., p. 9, ¶ 25. However, she does not dispute that details of the EEO process, including the 45-day limitation period for filing a complaint, were posted on the HRSA Intranet site which was accessible to HRSA employees and detailed in the Dallas office's employee policy and procedure manual. Def. App., pp. 157 at VI.5, 159 and 171-79. In addition, "[t]he requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event." *Pacheco*, 966 F.2d at 907. Plaintiff presents no evidence of such inquiry on her part. Therefore, equitable tolling is not warranted in this case under either 29 C.F.R. § 1614.105(a)(2)'s tolling provision or under general equitable tolling principles.

Because Plaintiff failed timely to initiate her administrative remedies with respect to her claims for gender and age discrimination, merits review of these claims is time-barred and Defendant is entitled to summary judgment on the same. *See, e.g., Raina v. Veneman*, 152 F. App'x 348 (5th Cir. 2005).

PLAINTIFF'S RETALIATION CLAIMS

Under Title VII, it is "an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice" by the statute or "because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. 42 U.S.C. ¤ 2000e-3(a)." [FN 2]

[FN 2] In Defendant's reply brief, he argues that the court does not have jurisdiction over Plaintiff's retaliation claim under the ADEA because the government has not waived sovereign immunity with respect to such claims. Def. Reply Br. at 1-2. Plaintiff does argue otherwise and states that "she will not oppose dismissal of her retaliation claim under the ADEA." Pl. Sur-Reply Br., p. 2. In any event, the same summary judgment proof is required on a claim of retaliation under either the ADEA or Title VII and, therefore, a separate analysis of Plaintiff's ADEA retaliation claim is unnecessary. Because the court concludes that Plaintiff has failed to establish a prima facie case of retaliation, it need not consider Defendant's sovereign immunity argument.

To establish a prima facie case of retaliation under Title VII, an employee must demonstrate that: (1) she engaged in protected activity; (2) an adverse employment action occurred; and (3) a

causal link exists between the protected activity and the adverse employment action. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007).

Where, as here, a plaintiff offers only circumstantial evidence of causation, the court applies the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See, e.g., Turner*, 476 F.3d at 348; *Strong v. University Healthcare System, L.L.C.*, 482 F.3d 802, 805 (5th Cir. 2007). Under that framework, the employee must first make a prima facie showing of retaliation. A Title VII plaintiff's subjective belief, standing alone, with respect to a retaliation claim is insufficient to establish a genuine issue of fact. *See, e.g., Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426-27 (5th Cir. 2000) (citing *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985)). The burden then shifts to the employer to state a legitimate, non-discriminatory reason for the employment action. Id. If the defendant meets his burden, the burden shifts back to the plaintiff which, in the context of the present action, requires that Marquardt prove that the failure to promote her to the Regional Coordinator position announced in vacancy number HRSA 2006-0117 would not have occurred but for her filing of a formal EEO complaint and/or the instant lawsuit, both of which constitute protected conduct. *Septimus v. University of Houston*, 399 F.3d 601, 608 (5th Cir. 2005). Specifically, the plaintiff must show that the employer's proffered reason is merely a pretext for the real, retaliatory

purpose. *Id.*

Defendant argues that Marquardt fails to make a prima facie case of retaliation because she cannot demonstrate a causal link between her protected activity in April 2005 and her nonselection for the Regional Coordinator position in October 2006. Marquardt posits two bases which she claims are sufficient to demonstrate genuine issues of fact. First, she claims that individuals involved in the selection of Jeff Jordan to fill the HRSA 2006-0117 position were aware of her EEO complaint and the fact that she had filed the present suit at the time Jordan was selected on October 26, 2006. Second, she claims that emails from Shirley Henley evidence animus against Plaintiff for having filed an EEO complaint in April 2005.

Marquardt's first argument is patently insufficient to establish a genuine issue of fact precluding a motion for summary judgment. To hold otherwise would bar a supervisor from taking any adverse employment action against an employee merely because the affected employee filed a prior EEO complaint or an employment discrimination case of which the supervisor was aware. The fact that Henley and Robert Sappington were aware of Plaintiff's claims at the time Jordan was selected constitutes too slender a reed to permit a reasonable jury to find a causal link between Marquardt's prior conduct and her non-selection for the HRSA 2006-0117 position.

Marquardt's temporal proximity argument is likewise insufficient to demonstrate the existence of

a genuine issue of fact. The Fifth Circuit has held that an inference of causation may be drawn where the adverse employment action occurs in close temporal proximity to the protected conduct. *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001). The Fifth Circuit recently clarified that "(1) to be persuasive evidence, temporal proximity must be very close, and importantly (2) temporal proximity alone, when very close, can in some instances establish a prima facie case of retaliation." *Strong*, 482 F.3d at 808 (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508 (2001)). {FN 2]

[FN 2] Plaintiff argues that the temporal proximity standard is relaxed in cases involving nonselection as opposed to those involving a termination or other employment decisions but cites no case law in support of this proposition. Neither the Fifth Circuit nor the Supreme Court has indicated that the close proximity requirement is in any way dependent upon the type of employment action at issue. The court sees no reason to deviate from the case law merely because this case involves Plaintiff's non-selection for a vacant position as opposed to a termination decision or other adverse employment action.

In this case, Plaintiff filed her informal EEO complaint in April of 2005. She argues that her non-selection for HRSA position 2006-0117 on October 26, 2006 was in retaliation for her April 2005

complaint. The time lapse of more than 18 months is insufficient evidence of causality to establish a prima facie case. See *Evans*, 246 F.3d at 354 (noting that decisions from district courts in this circuit have found "a time lapse of up to four months . . . sufficient to satisfy the causal connection for summary judgment purposes"); *Breeden*, 532 U.S. at 273-74 (citing with approval Tenth and Seventh Circuit cases holding three and four month periods to be insufficiently close).

Marquardt attempts to buttress her retaliation claim by referring the court to two e-mails sent by Shirley Henley to Jim McRae, the Associate Administrator of HRSA, regarding her former EEO complaint, asserting that they constitute evidence of "a negative attitude toward [Plaintiff's] protected activity" and of "expressed hostility toward the EEO investigator." The first email, Pl. App, p. 120, dated May 10, 2005 simply informs McRae and others of the status of Marquardt's first EEO complaint with respect to her non-selection in January 2005. In the second email, Pl. App., pp. 118-119, dated July 29, 2005, Henley detailed the chronology of Marquardt's complaint and related conversations with various HRSA employees. *Id.* Henley expressed frustration with the fact that the agency was not applying the 45-day time frame for filing EEO complaints. [FN 4] She stated:

[FN 4] That federal agencies act on untimely submitted complaints seems to occur with some frequency. See *Rowe*, 967 F.2d at 191.

> [I]t appears to me that EEO not following the 45 day timeframe for filing EEO complaints is putting the agency in a vulnerable position. While I know Lynda's allegations are false and feel we have solid documentation surrounding the interview and selection process, this is creating uncalled for angst and additional workload. I don't know who the specific individual that should be made aware of this; however, somebody higher up the chain should be notified that this is going on consistently.

Id. Henley's comments are primarily aimed at the agency's failure to enforce the 45-day filing requirement and do not demonstrate a causal connection between Plaintiff's protected activity and her non-selection some 14 months later. The period between these communications and October 2006, the fact that Henley's comments do not evidence any intention to retaliate against Plaintiff for having filed a complaint with respect to her non-selection in January 2005 and the fact that Henley was not solely responsible for the selection of Jeff Jordan for the HRSA 2006-0117 position, considered singularly or together, fail to permit a reasonable inference of causality to be drawn.

For the above reasons, Plaintiff has failed to show a causal link between her protected activity

and the adverse employment action and cannot establish a prima facie case of retaliation. Therefore, Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

CONCLUSION

For the foregoing reasons, it is ordered that Defendant's motion for summary judgment is granted and Plaintiff's case is dismissed with prejudice.

Signed this 6th day of February, 2008.

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s/ *Wm. F. Sanderson Jr.*

UNITED STATES MAGISTRATE JUDGE

DEPARTMENT OF HEALTH AND HUMAN SERVICES, May 30, 2006. [*Excerpt*][2]

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES EEO COMPLAINT FINAL DECISION

Complainant: Lynda Marquardt

Complaint No.: HRS-005-05

Agency: Health Resources and Services Administration (HRSA)

Claim: Non-selection for one of three Regional Coordinator (GS-14) positions; treated differently that younger newer employees

Bases: Gender (female) and Age (58)

DECISION

The Department finds the Complainant was not discriminated against based on gender or age for the claims cited above. Accordingly, no relief, attorney fees, or corrective action is ordered.... .

The entire record has been reviewed and considered. Management has articulated legitimate non-discriminatory reasons for its actions. You have not provided, nor does the record reveal, any persuasive material evidence or testimony which demonstrates the actions at issue

[2] Because the 14-page agency decision contains only a single sentence relevant to the question herein presented, Petitioner has provided only the relevant excerpt.

there is insufficient evidence to demonstrate pretext. Accordingly, there is no preponderance of evidence to support unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act (ADEA, as amended.

[LYNDA MARQUARDT'S TYPEWRITTEN ATTACHMENT TO EEO COUNSELOR'S REPORT] [Excerpt]

Age/Gender Bias:

January 25, 2005 - Advised I had not been selected for promotion to one of three (3) regional coordinator GS-14 positions. Positions were filled by younger individuals (two males and one female) with considerably less time and experience with HRSA/OPR. An EEO action would have been filed sooner, but information about how and when to file a complaint was not clearly posted or available in the workplace. I was not made aware of timelines or deadline dates until legal counsel was consulted. ... .

Sappington, Robert (HRSA)

From: Henley, Shirely (HRSA)

Sent: Tuesday, May 10, 2005 1:35 p.m.

To: Macrae, Jim (HRSA); Dammons, Cheryl (HRSA)

Cc: Sappington, Robert (HRSA)

Subject: EEO Complaint

Jim and Cheryl, just to follow-up regarding our conversation with Valentine Liu

- Mr. Liu indicated that the 45 days is "loosely" followed at the "informal" complaint stage
- He said that one Lynda receives the response to her informal complaint from the EEO counselor, she has 15 days to file a formal complaint. He said the 15 days is adhered to more closely
- He indicated that in his experience, "there isn't much substance to Lynda's complaint
- I asked for clarification around the hostile work environment allegation and Mr. Liu brought up Jim's remarks about "if this isn't your cup of tea, let Bob/Shirley or me know and we'll help you find something else" during the introduction to PR 201. Bob explained that this was a positive/generous statement and not intended as a "get out now" directive. Mr. Liu agreed
- So, at least we know about the 45 days and we'll wait and see if Lynda files a formal complaint
- Additionally, we are still waiting to hear from the OGC attorney about Sid Petersen's PIP. As soon

as we receive feedback from the attorney, do you want us to proceed or would you like to review the PIP before we present it to Sid? Please advise

Shirley

No. 08-1048

In the Supreme Court of the United States

LYNDA MARQUARDT, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal agency that has issued a final decision denying on the merits an employment discrimination complaint without addressing the timeliness of the administrative complaint may raise a timeliness defense after petitioner brings suit in federal district court.

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In the Supreme Court of the United States

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LYNDA MARQUARDT, PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the *Federal Reporter*, but is reprinted in 294 Fed. Appx. 112. The opinion of the district court (Pet. App. A5-A20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2008. A petition for rehearing was denied on November 18, 2008 (Pet. App. A3-A4). The petition for a writ of certiorari was filed on February 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* as amended, prohibits discrimination in federal employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-16(a). The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, similarly prohibits discrimination in federal employment on the basis of age. 29 U.S.C. 633a(a). Federal employees who believe that they have been discriminated against must consult an Equal Employment Opportunity (EEO) counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1). If the matter is not resolved within 30 days, subject to a 60-day extension upon the employee's agreement, the EEO counselor shall provide notice of the right to file a formal discrimination complaint with the employing agency within 15 days of receipt of that notice. 29 C.F.R. 1614.105(d) and (e), 1614.106(a) and (b).[1]

"Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint" that, *inter alia*, (i) "fails to comply with the applicable time limits contained in §§1614.105, 1614.106 * * * unless the agency extends the time limits in accordance with § 1614.604(c)";

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[1] Under both the ADEA and Title VII, a claimant may invoke the EEO administrative process and then sue in federal court if dissatisfied with the results. 29 U.S.C. 633a(b) and (c); 42 U.S.C. 2000e-16(b) and (c). Alternatively, under the ADEA, the claimant may bring suit directly in federal court so long as, within 180 days of the alleged discriminatory act, he provides the Equal Employment Opportunity Commission (EEOC) with notice of his intent to sue at least 30 days before commencing suit. 29 U.S.C. 633a(c) and (d). Petitioner did not invoke the alternative procedure in this case.

or (ii) "is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint." 29 C.F.R. 1614.107(a)(2) and (3). The regulations further provide that "[t]he time limits in this part are subject to waiver, estoppel and equitable tolling." 29 C.F.R. 1614.604(c).

2. Petitioner is a 62-year-old female who has been employed by the Dallas regional office of the Department of Health and Human Services (the agency) since 1991. Pet. App. A7. Petitioner applied for one of three newly created Regional Coordinator positions for the Dallas office announced in August 2003. *Id.* at A8. After the application and interview process had been completed, the Dallas Division Director informed candidates for that position that no selection would be made at that time. *Ibid.* An April 20, 2004 email to all employees announced the names of the new Regional Coordinators for all regions hiring except Dallas, where the position would be filled later in the year. *Ibid.*

On November 19, 2004, the agency readvertised the Regional Coordinator positions for the Dallas office. Pet. App. A8. Petitioner applied again. *Ibid.* The agency hired the top three scorers based on its interview-panel rating process—two males and one female—to fill the three Regional Coordinator positions. *Ibid.*; Gov't C.A. Br. 10-11. On January 25, 2005, the Dallas Division Director informed petitioner that she had not been selected, and that if she disagreed with the decision, she could pursue EEO or union channels. Pet. App. A8.

In April 2005, petitioner initiated contact with an EEO counselor by filing an informal complaint alleging age and gender discrimination. Pet. App. A8-A9. Peti-

tioner subsequently filed a formal EEO complaint with the agency on May 31, 2005.[2] Petitioner did not request a hearing before an administrative judge.

On May 30, 2006, the agency's EEO office issued a final decision on the merits, concluding that petitioner "was not discriminated against based on gender or age." Pet. App. A21. The agency's decision stated that "[t]he entire record has been reviewed and considered." *Ibid.* The agency did not address timeliness.[3]

3. On May 18, 2006, twelve days before the agency had issued its final decision, petitioner brought suit against respondent in federal court for discriminatory failure to promote her, in violation of Title VII and the ADEA. Pet. 4.

The district court granted summary judgment for respondent and dismissed petitioner's discrimination claims as untimely. Pet. App. A5-A20. The court noted that federal employees "must initiate contact with a[n] [EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action," 29 C.F.R. 1614.105(a)(1), and that the failure to initiate contact within the required period will bar subsequent review of the claim in federal court absent

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[2] The district court noted that the record before it did not contain a copy of petitioner's formal EEO complaint. But, as the court also noted, the cover letter to the final agency decision contains the notation "DOF: 5-31-05." Pet. App. A9.

[3] Petitioner filed a second EEO complaint, alleging that the agency retaliated against her by failing to select her for a subsequent Regional Coordinator opening in October 2006. Pet. App. A9-A10. The district court rejected petitioner's retaliation claim on the merits (*id.* at A14-A20), and the court of appeals affirmed that decision (*id.* at A1-A2). Petitioner's retaliation claim is not at issue here.

waiver, estoppel, or equitable tolling. Pet. App. A10-A11. The court found that it was "undisputed" that petitioner received notice via email on April 20, 2004, that the first position was not going to be filled and learned on January 25, 2005, that she had not been selected for the second position. *Id.* at A11. The court found that petitioner nevertheless did not contact an EEO counselor any earlier than April 1, 2005—"well past the 45-day deadline." *Ibid.*

The court rejected petitioner's argument that the agency had waived a timeliness objection. Pet. App. A11-A12. The court reasoned that, under controlling circuit precedent, the agency must make a specific finding that the EEO submission is timely in order to waive a timeliness objection. *Ibid.* (citing, *e.g.*, *Rowe* v. *Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992)). The court concluded that because the agency did not find petitioner's complaint timely, the agency did not waive an objection based on the 45-day requirement in her case. *Id.* at A12.

The district court also rejected petitioner's argument for tolling under either 29 C.F.R. 1614.105(a)(2) or general equitable tolling principles. Pet. App. A12-A13. Although petitioner argued that the agency did not inform her of the 45-day filing deadline and that the agency had a practice of applying that deadline "loosely," the court found that petitioner "does not dispute" that details of the EEO process—including the 45-day limitation period—were posted on an accessible agency intranet site and contained in the Dallas office's employee manual. *Id.* at A11-A13. Under those circumstances, and the lack of an affirmative inquiry on petitioner's part, the court concluded that tolling was unwarranted. *Id.* at A13.

4. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. A1-A2. It noted that petitioner "appears to acknowledge that her argument for timeliness is foreclosed by *Rowe* v. *Sullivan*, 967 F.2d 186 (5th Cir. 1992), on which the district court properly relied." *Id.* at A2.

ARGUMENT

Petitioner argues that an agency waives a timeliness defense to a federal court action when it decides an EEO complaint without addressing timeliness. Although the courts of appeals have disagreed on that issue, the result reached by the courts below is correct. In any event, this case does not present an appropriate vehicle to resolve that disagreement. Once petitioner filed her federal court action (12 days *before* the agency issued its decision), EEOC regulations required the agency to dismiss her pending EEO complaint. 29 C.F.R. 1614.107(a)(3). Because the agency appears to have lacked authority to issue its final decision, that decision cannot form the basis of a timeliness waiver even under petitioner's preferred standard. Further review is therefore unwarranted.

1. There is no question in this case that petitioner did not timely seek EEO counseling. The agency nevertheless investigated petitioner's complaint and ultimately issued a decision rejecting her discrimination claim without addressing timeliness. The courts of appeals are in agreement that an agency does not waive its timeliness defense to a federal court action merely by accepting and investigating petitioner's claim of discrimination. See, *e.g.*, *Horton* v. *Potter*, 369 F.3d 906, 911 (6th Cir. 2004) (collecting cases). As petitioner points out (Pet. 6-8), however, the courts of appeals disagree

about when agency *adjudication* of the EEO complaint triggers waiver of the timeliness defense.

In the Fifth Circuit, the agency "must make a specific finding that the claimant's submission was timely" in order to waive a timeliness objection. *Rowe* v. *Sullivan*, 967 F.2d 186, 191 (1992); see Pet. App. A2. By contrast, the Seventh Circuit's rule (applied or endorsed by several other courts of appeals) is that "when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit." *Ester* v. *Principi*, 250 F.3d 1068, 1071-1072 (2001); see, *e.g.*, *Horton*, 369 F.3d at 911 ("waiver occurs when the agency decides the complaint on the merits without addressing the untimeliness defense"); *Bruce* v. *United States Dep't of Justice*, 314 F.3d 71, 74-75 (2d Cir. 2002) (citing *Ester* with approval as "good law" albeit inapplicable in that case); *Bowden* v. *United States*, 106 F.3d 433, 438-439 (D.C. Cir. 1997) ("if [agencies] not only accept and investigate a complaint, but also decide it on the merits—all without mentioning timeliness— their failure to raise the issue in the administrative process may lead to waiver of the defense when the complainant files suit"); *cf. Hall* v. *Department of the Treasury*, 264 F.3d 1050, 1061 (Fed. Cir. 2001) (applying *Ester* in Merit Systems Protection Board case). The Ninth Circuit, meanwhile, has stated that "[t]he mere receipt and investigation of a complaint does not waive objection to a complainant's failure to comply with the original filing time limit *when the later investigation does not result in an administrative finding of discrimination*." *Boyd* v. *USPS*, 752 F.2d 410, 414 (1985) (emphasis added). That view could be characterized as a compromise approach, because the last clause implies that an administrative finding of discrimination

could waive the timeliness defense (see *Ester*, 250 F.3d at 1071).

In the government's view, the compromise approach attributed to *Boyd*—that an agency waives a subsequent timeliness defense by not addressing timeliness in its final decision if, but only if, it makes a specific finding of discrimination—best reconciles the different interests at stake. Like the Fifth Circuit's rule, the compromise approach conserves limited administrative and judicial resources and protects the public fisc against untimely claims. For example, an agency might determine in a particular case that denying an EEO complaint on the merits is more efficient or worthwhile than addressing a factbound timeliness issue. Cf. *Pearson* v. *Callahan*, 129 S. Ct. 808, 818 (2009) (requiring adjudication of all issues "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case"). An agency should not be penalized for investigating and denying a discrimination claim on the merits, rather than dismissing it as untimely at the outset. See *Rowe*, 967 F.2d at 191 ("agencies may inadvertently overlook timeliness problems and should not thereafter be bound") (quoting *Henderson* v. *United States Veterans Admin.*, 790 F.2d 436, 441 (5th Cir. 1986)). Foreclosing the agency in those circumstances from thereafter asserting a timeliness defense to a civil action could discourage it from investigating certain discrimination claims and instead cause it to dismiss more cases as untimely—thereby undermining the goal of ferreting out illegal discrimination in the federal workplace.

At the same time, where the agency has made a finding of discrimination, that would rarely be the more efficient or easier route. The agency's finding of discrimi-

nation can thus be taken as an implicit waiver of any untimeliness argument. The compromise approach also mitigates the Seventh Circuit's concerns about the administrative process and prejudice to the plaintiff. See *Ester*, 250 F.3d at 1072-1073. Waiver after a finding of discrimination would eliminate unfair surprise to a plaintiff who had relied on the agency's determination that her claim was meritorious. A plaintiff whose claim was denied on the merits, however, has no such reliance interest.

Given that the agency's final decision here found no discrimination, the courts below reached the correct result in concluding that the agency had not waived the timeliness defense. Accordingly, this Court's review is unnecessary.

2. Irrespective of which legal rule is correct, this case does not present an appropriate vehicle for resolving the conflict. Petitioner filed her district court action on May 18, 2006. As of that date, the agency had not taken any final action on petitioner's administrative complaint. Under EEOC regulations, given that petitioner had not requested a hearing and that 180 days had passed since the filing of her EEO complaint, the agency was required to dismiss the complaint. See 29 C.F.R. 1614.107(a)(3) ("Prior to a request for a hearing in a case, the agency *shall* dismiss an entire complaint * * * [t]hat is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint.") (emphasis added); cf. 29 C.F.R. 1614.409 (filing a civil action

"shall terminate Commission processing of the appeal").[4] The regulation's plain text is mandatory and serves sensible purposes. See *Menoken* v. *James*, EEOC Request No. 05A30918, 2005 WL 38762, at *3 (Jan. 3, 2005). Dismissal in those circumstances avoids "wasting resources, and creating the potential for inconsistent or conflicting decisions," and gives "due deference to the authority of the federal district court." *Smith* v. *Potter*, EEOC Request No. 05A30021, 2002 WL 31888936, at *1 (Dec. 18, 2002); see *Stromgren* v. *Derwinski*, EEOC Request No. 05891079, 1990 WL 711560 (May 7, 1990).

Consequently, the agency lacked authority to issue its decision on May 30, 2006—12 days *after* petitioner had filed in district court. That agency decision, at least for present purposes, appears to be without legal effect. It therefore cannot trigger a waiver of a timeliness defense in federal court under any of the potentially applicable standards—including the one advocated by petitioner—all of which premise waiver on a valid agency adjudication. As noted above, there is no disagreement that any investigation and processing short of a final agency decision cannot constitute a waiver of a timeliness defense. See pp. 6-7, *supra*. Accordingly, regardless of which standard applies, the agency in this case did not, by operation of its decision, waive the right to raise the untimeliness defense. This case is thus a de-

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[4] As the EEOC has recognized, Section 1614.409 contains a typographical error, referencing civil actions under Sections "1614.408 or 1614.409" instead of Sections 1614.407 and 1614.408. The regulation thus applies to civil actions predicated on Title VII or the ADEA. See *Menoken* v. *James*, EEOC Request No. 05A30918, 2005 WL 38762, at *3 (Jan. 3, 2005). Once the EEOC is divested of authority over the matter, the agency EEO office is similarly divested of authority to further process the complaint.

cidedly poor vehicle to resolve the circuit conflict on the waiver standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2009

(3)

No. 08-1048

IN THE
SUPREME COURT OF THE UNITED STATES

LYNDA MARQUARDT,

Petitioner,

v.

KATHLEEN SIBELIUS, SECRETARY,
UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal agency may raise a timeliness defense in an employment discrimination complaint filed in federal court, where it knowingly accepted the underlying untimely administrative complaint, investigated it, and issued a final decision on the merits without ever raising the issue of timeliness.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

1. THE ISSUANCE OF AN AGENCY'S FINAL DECISION AFTER A LAWSUIT IS FILED SHOULD NOT AFFECT THE QUESTION OF AN AGENCY'S WAIVER OF THE TIMELINESS DEFENSE IN FEDERAL COURT.

On May 18, 2006, Lynda Marquardt filed a discrimination complaint in federal court because more than 180 days had passed since she initiated the administrative process. *29 C.F.R. 1614.310 (i)* . On May 25, 2006, counsel certified that on May 22, 2006, she had served the Secretary of the U.S. Department of Health and Human Services, the U.S. Attorney General, and the Office of the U.S. Attorney, Northern District of Texas, Dallas Division by U.S. Certified Mail, return receipts requested.

The return receipts show that U.S. Attorney, Northern District of Texas, was served on May 23, 2006, but the Secretary of the Department of Health and Human Services and the U.S. Attorney General were not served until May 30, 2006. That same day, the agency issued its final decision on the merits of Ms. Marquardt's administrative complaint, apparently unaware that she had filed a lawsuit. Therefore, the agency clearly intended that

its final decision would have legal effect, insofar as it would trigger the 90-day time period within which Marquardt could file a lawsuit in federal court. The final agency decision dismissing her administrative complaint had no legal effect other than the triggering of this time period. *29 C.F.R. 1614.110 (b).*

Whether a final agency decision is issued before or shortly after a lawsuit is filed does not change how that decision affects the plaintiff. The agency accepted, investigated and issued its decision without ever raising the issue of the complaint's timeliness. This, in conjunction with the fact that the policy of the agency's EEO office was to apply the 45-deadline only "loosely," led Marquardt to believe that the agency had, in effect, waived the 45-day deadline in her case. This reasonable belief encouraged her to pursue her lawsuit and incur many thousands of dollars in attorney fees and deposition costs. Had the agency raised the timeliness defense at any stage of the administrative process, Marquardt would have had to consider more carefully whether or not to continue her lawsuit.

The Government cites no authority for the proposition that whether or not an agency decision has "legal effect" has an impact on the question of waiver of the timeliness defense. The decision was, in fact, issued and the question of timeliness not raised. Therefore, it still falls within the ambit of the rule adopted by *Ester v. Principi*, along with other federal courts, that where an agency accepts a discrimination complaint, investigates it, and

issues a decision on the merits without raising the issue of timeliness, the agency is then deemed to have waived the defense in a subsequent lawsuit. *Ester v. Principi*, 250 F.3d 1068, 1071-1072 (7th Cir. 2001).

2. THE NINTH CIRCUIT RULE ON AN AGENCY'S WAIVER OF THE TIMELINESS DEFENSE IS UNFAIR TO POTENTIAL PLAINTIFFS BECAUSE AGENCIES RARELY FIND THAT DISCRIMINATION OCCURRED.

The Ninth Circuit rule, articulated in *Boyd v. USPS*, that waiver of the timeliness defense only occurs if the agency makes a finding that discrimination occurred, is not a good compromise between the Fifth Circuit rule and the rule established by the Seventh Circuit in *Ester*. *Boyd v. USPS*, 752 F.2d 410, 414 (9th Cir. 1985); *Ester*, 250 F.3d at 1071-1072. This is so for the simple reason that agency decisions, including those by the Department of Health and Human Services, rarely result in a finding of discrimination. One only has to look at the data posted by the Department of Health and Human Services on its public website, pursuant to the No Fear Act, to find support for this statement.[1]

In 2005, 2006, and 2007, the number of administrative complaints filed against DHHS amounted to 290, 249, and 271, respectively.

[1] U.S. Department of Health and Human Services, HHS.gov, http://www.hhs.gov/asam/oeeo/no_fear_bullet_4.html#activity.

However, in those same years, the total number of final actions finding discrimination were only five in 2005, three in 2006, and two in 2007. Such statistics cast doubt on the agency's enthusiasm for remedying discrimination and its willingness to make an adverse finding against itself.

3. THE COURT SHOULD FIND THAT THIS CASE IS AN APPROPRIATE VEHICLE FOR ESTABLISHING A UNIFORM RULE ON WAIVER OF THE TIMELINESS DEFENSE.

The Fifth Circuit rule bestowing what amounts to immortal status on an agency's right to raise a timeliness defense raises significant and recurring problems of fairness for discrimination plaintiffs. To let it stand would defeat the remedial purposes of this nation's anti-discrimination laws. In *Ester*, the Seventh Circuit has fashioned a just and reasonable rule that makes agencies responsible for their actions while still allowing them to raise an untimeliness defense at any stage of the administrative process.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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